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No. 92-396

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ASTRONICS CORPORATION and
RODGARD CORPORATION,

Petitioners,

v.

THEODORE C. PATECELL and
THE PATECELL CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF OF PETITIONERS

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When stripped of its attack on strawmen, respondents' brief in opposition ("RB") confirms the showing in the petition ("Pet.") that certiorari should be granted.

1. On the issue of summary affirmance without opinion, respondents do not dispute that: the subject is important; such affirmances entail serious risks and costs (*see* Pet. 8-9; Amicus Brief 2-4); they have become even more controversial as their use, meant to be "sparing," has ballooned in recent years (*see* Pet.

12-13);[1] and the terms of Federal Circuit Rule 36 (and like rules) and its application in this case confirm the need for guidance concerning the permissible uses of such rules and practices.

Instead, respondents misstate our position as seeking "to void all the federal appellate rules allowing decisions without opinion" (RB 7), as contending that "courts give inadequate consideration when their decision is not accompanied by a written and published opinion" (RB 8),[2] and as insisting on "full opinions in every case" (RB 9). We do not. We recognize that there may be a need for summary affirmances without opinion. We submit only that, as amici confirm, there is sufficient reason for concern about abuse or overuse to warrant this Court's supervisory guidance. Respondents have not shown otherwise.

Respondents assert that use of summary affirmance "only means that the decision of the Court of Appeals has no precedential value and does not require a new interpretation of law" (RB 9). In the case of rules like Rule 36, that is not so. By that rule's terms, such an affirmance may mean only that the evidence

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[1] The leading early decision on such opinions contemplated that their use would be "sparing." *NLRB v. Amalgamated Clothing Workers*, 430 F.2d 966, 972 (5th Cir. 1970) (cited at RB 8 n.13, 9 n.16, 10 n.17). Similarly, in *Furman v. United States*, 720 F.2d 263, 266 (2d Cir. 1983) (cited at RB 8 n.12, 9 nn.15, 16, 10 n.18), the court stated that its practice was still to provide, if not a "formal" opinion, *i.e.*, a "fully developed exercise[] of judicial craftsmanship," at least an oral or brief statement of rationale in virtually every case, unless the appeal were "frivolous."

[2] The issues of whether opinions should be published, or citable, are important but separate matters not raised by the petition.

was sufficient to support the verdict, even though there may have been dispositive legal errors.[3] Respondent does not dispute that to permit affirmances without opinions in these circumstances is to undermine the integrity of the appellate process.

2. Respondents' primary response has been to belittle the petition as presenting merely a question of the sufficiency of the evidence (RB 3, 4). This reflects a misreading of the petition. It rests explicitly upon precisely the opposite premise, *i.e.*, that the court of appeals properly found the evidence of lost profits sufficient (Pet. 6).

What respondents ignore, as they did below, is the indisputable error in the jury instructions on lost profits, an "error of law" that is "dispositive" here (*see* Pet. 7-8, 13). Their silence tacitly confirms that the court of appeals could not properly have affirmed the judgment even if the evidence of lost profits as damages was sufficient (*id.*).

Respondents also do not dispute that they withdrew their claim for royalties, and conceded that there was no evidentiary basis for the jury to award a reasonable royalty as damages (*see* Pet. 3 & n.2). Instead, they assert that the jury could have awarded royalties based on the evidence of lost profits (RB 5-7). But such a verdict would be tainted by the same reversible error in the absence of instructions about how to determine lost profits.

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[3] In *United States v. Baynes*, 548 F.2d 481, 483-84 (3d Cir. 1977) (cited at RB 8 n.13), the court relied on *Amalgamated* in emphasizing that the appellate court must address all potentially "dispositive" issues and find no errors of law.

Moreover, respondents err in asserting that, to establish a royalty, the "first" or "primary" inquiry is the patentee's actual lost profits (RB 6, 7). As the cases they cite make clear, "'[i]n fixing a reasonable royalty, the primary inquiry . . . is what the parties would have agreed upon . . .,'" modified to take account of the "loss . . . of anticipated profits." *Panduit Corp. v. Stahlin Bros. Fibre Works, Inc.*, 575 F.2d 1152, 1163 (6th Cir. 1978) (*see* RB 5 n.5).[4] Even if the royalty issue had not been taken out of the case (Pet. 3), the undisputed absence of evidence on the "primary" inquiry would have precluded a supportable verdict based on a reasonable royalty.[5]

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[4] Respondents' effort to treat actual lost profits and royalties reflecting anticipated lost profits as interchangeable is contrary not only to the case law they ignore (*see* Pet. 6 n.3, 7 n.6), but to the cases they cite, including *Panduit*. There the court referred to "'anticipated profits'" the patentee will lose by licensing a competitor as a factor in addition to what the parties would have agreed upon in arms length negotiations. 575 F.2d at 1163-64. Similarly, in *Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116, 1127 (S.D.N.Y. 1970), *modified on other grounds*, 446 F.2d 295 (2d Cir.), *cert. denied*, 404 U.S. 870 (1971), the court noted that a reasonable royalty "is not . . . commensurable with actual damages computed in terms of demonstrably proved lost profits."

[5] Respondents allude without discussion to their having argued that the appeal should have been "prohibit[ed]" by petitioners' alleged failure to comply with Fed. R. Civ. P. 50(b), 51(c) and 59(b) (RB 3). This is a reference to their arguments that petitioners' post-trial motions (and hence petitioners' notice of appeal) were untimely, a contention that overlooked the 1985 amendments to Fed. R. Civ. P. 6(a) concerning the counting of non-business days. If the Federal Circuit had agreed with respondents' unfounded contention, it would have been obliged to dismiss the appeal, rather than affirm on the merits, as it did.

CONCLUSION

The Court should grant the writ.

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